IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ARTHUR VICTOR NEWMARK, *Petitioner*, v. JEFFREY CRAWFORD, *et al* *Respondents*.	Case No. 1:25-cv-929 (PTG/WEF)

FEDERAL RESPONDENTS' RESPONSE IN OPPOSITION TO THE PETITION FOR A WRIT OF HABEAS CORPUS

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Federal Respondents Russell Hott, Todd Lyons; Erik S Siebert; and Kristi Noem, in their official capacities, respectfully submit their Response in Opposition to the Verified Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief for an Order to Show Cause (hereinafter, the "Petition"), *see* Dkt. 1.

INTRODUCTION

Petitioner Arthur Victor Newmark claims, without any evidence, statutory authority, regulatory authority, or even caselaw, that Immigration and Customs Enforcement's ("ICE's") *decision* to arrest and detain him while he has a pending asylum application violates his rights under the Due Process Clause of the Fifth Amendment. But Petitioner's unsupported allegations cast doubt as to whether this Court should exercise its judicial power to issue such a writ. Indeed, while Petitioner filed an asylum application while he was in lawful status, Petitioner was required to maintain legal status to avoid the initiation of removal proceedings under 8 U.S.C. § 1227(a)(1)(B). And while an asylum applicant may "remain in the U.S." pending the adjudication of his asylum application, there is no statutory or regulatory authority protecting an asylum applicant from being *detained* Contrary to Petitioner's claims, the INA affords Petitioner the opportunity to raise his asylum claims in immigration court. Even further, U.S. Citizenship and Immigration Services ("USCIS") has already forwarded Petitioner's asylum application to immigration court so that it can be considered there And Petitioner is scheduled for a hearing in immigration court on June 16, 2025. The Government has clearly provided, and will continue to provide, Petitioner with due process.

This Court should deny the Petition Petitioner's claims face several jurisdictional bars In short, Petitioner is challenging his arrest and initial detention. These challenges are foreclosed by several provisions of the INA, which make clear that this Court lacks jurisdiction over such claims.

Even if this Court were to have jurisdiction over the Petition, Petitioner's arrest and detention do not violate the Due Process Clause. As the Fourth Circuit has made clear, "Supreme Court precedent establishes that the current procedures used for detention under § 1226(a) satisfy due process." *Miranda v. Garland*, 34 F 4th 338, 366 (4th Cir. 2022). Per *Miranda*, the existing regulations, which govern Petitioner's case, provide Petitioner, and other similarly-situated aliens, with the opportunity to be heard at a meaningful time and in a meaningful manner, and therefore amply satisfy due process. Given that Petitioner will have the opportunity to seek bond from the immigration court in a matter of days, Petitioner thus cannot say that he is being deprived of due process, and the Fourth Circuit's holding makes clear that he is not entitled to any further relief.

For all these reasons, the Court should deny and dismiss the Petition.

BACKGROUND

A. Statutory and Regulatory Background

Federal Respondents provide the following statutory and regulatory background to illustrate to the Court how Petitioner's arrest and current detention does not violate the Due Process Clause of the Fifth Amendment

1. Seeking Asylum

Pursuant to the INA, generally, a foreign national may not be admitted into the U.S. without first being found eligible for, and issued, a visa *See* 8 U.S.C § 1181(a). The INA defines "admitted" as "the lawful entry of an alien into the [U S] after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A). Any alien who is physically present in the U.S., whether or not they were admitted, may apply asylum *Id* § 1158(a). Asylum applicants must meet the definition of a "refugee" by demonstrating they either experienced past persecution or have a well-founded fear of future persecution on account of a specific protected ground listed in the statute.

See id. §§ 1101(a)(42)(A), 1158(b)(1)(B)(i) Applicants must also establish that they warrant a favorable exercise of discretion that is expressly afforded to the Secretary of Homeland Security ("Secretary") or the Attorney General. *Id* § 1158(b)(1)(A).

Asylum applications may be filed with U.S. Citizenship and Immigration Services ("USCIS") or, if the asylum applicant is removal proceedings with an immigration judge ("IJ"). *See* 8 C.F.R. § 208.2(a), (b); *Id* § 1208.2(a), (b). If an alien seeks asylum *while in* removal proceedings, the IJ has exclusive jurisdiction over the application. *Id.* But once a Notice to Appear ("NTA") is filed, jurisdiction rests with the IJ. *See id* §§ 208.2(b), 1208.2(b). Both USCIS and the IJ "may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of the Department of Homeland Security or the Attorney General under this section if . . . [it is] determine[d] that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title. 8 U.S.C. § 1158(b)(1)(A). If an alien is granted asylum, he or she will be classified as an "asylee" and have an active immigrant status. *See* 8 U.S C. §§ 1158, 1101(a)(42) (defining refugee); *see also Immigrant Classes of Admission*, Office of Homeland Security Statistics, U S. Department of Homeland Security (classifying asylees as AS6).[1] However, the INA and its implementing regulations fail to confer a status or classification on an alien *seeking* asylum, unless he or she maintains the status on which he or she was admitted. *See id.* (illustrating that only those granted asylum are classified and have status).

2. *B-2 Nonimmigrant Visas and Visa Overstays*

Visas are classified into two types: nonimmigrant and immigrant, *see id.* §1201(a)(1), and nonimmigrant visas. *See id* § 1101(a)(15). Aliens who wish to come to the U.S. temporarily to

[1] Retrievable at: https://ohss.dhs gov/topics/immigration/lawful-permanent-residents/immigrant-classes-admission (last accessed June 5, 2025).

visit may be lawfully admitted to the U.S under a nonimmigrant visa known as a "B-2" visa 8 C.F.R. § 214.1(a)(2); 22 C.F.R § 41.12, Table 1; *see* 8 U.S.C. §§ 1101(a)(15)(B); 8 C.F.R. § 214.2(b)(1). A B-2 visa is authorized for only a certain period of time. *See* 8 C.F.R. § 214.2(b)(1), (2). However, a B-2 nonimmigrant visa holder "may be granted extensions of temporary stay in increments of not more than six months each[.]" *Id* § 214.2(b)(1); *see id.* § 214.1(c). But if a B-2 nonimmigrant does not plan to extend the stay past his or her authorized period of time, he or she must depart the U.S. at the "expiration of his or her authorized period of admission." *Id.* § 214.1(a)(3)(ii); *see* 8 U.S.C. § 1184(a)(1). Failure to depart will void his or her status "beginning after the conclusion of such period of stay," and he or she will be accruing unlawful presence. 8 U.S.C. § 1202(g); *see* 8 C.F.R. § 214.1(a)(3)(ii).

3. *Initiation of Removal Proceedings*

Any alien admitted (whether or not he is in lawful status), to the U.S. may be removed from the U.S. if the alien is within a class of deportable aliens outlined in section 237(a) of the INA, 8 U.S.C. § 1227(a). *see also id* § 1229a (provision on removal proceedings). One class of deportable aliens, as explained in section 237(a)(1)(B) of the INA, 8 U.S.C. § 1227(a)(1)(B), includes "any alien who is present in the U.S. [and] in violation of [the INA] or any other laws of the U.S.[.]" If any immigration officer determines an alien meets one of the deportable classes, he may initiate removal proceedings, see 8 U.S C. § 1229a, by serving the alien with a NTA. 8 U.S.C. § 1229(a)(1); 8 C F R. § 239.1.

4. *Authority to Detain Removable Aliens – 8 U S C. § 1226(a)*

Once removal proceedings are initiated, an alien may be detained. See generally 8 U.S.C. § 1226. 8 U.S.C. § 1226 authorizes two different types of detention: (1) discretionary detention

pursuant to 8 U.S.C. § 1226(a), and (2) mandatory detention pursuant to 8 U.S.C. § 1226(c) [2] On the other hand, 8 U.S.C. § 1231—and the Supreme Court's decision construing that provision in *Zadvydas v. Davis*, 533 U.S. 678 (2001)—govern the Executive's authority to detain an alien *after* she or he has received a final order of removal from the U.S.

Initially, the INA provides the "an alien may be arrested and detained pending a decision on whether the alien is to be removed from the [U.S.]" 8 U.S.C. § 1226(a). The very same statutory section provides that during those administrative proceedings, federal authorities enjoy the discretion either to maintain that detention, *see id* § 1226(a)(1), release the alien on bond, *see id* § 1226(a)(2)(A), or release the alien on conditional parole, *see id* § 1226(a)(2)(B). ICE and the immigration courts operated by the Executive Office for Immigration Review (within the Department of Justice) ("EOIR") share this discretionary authority.

Upon initial apprehension of a removable alien, ICE makes an individualized custody determination. *See* 8 C.F.R. § 236 1(c)(8), (g). ICE may release the alien on bond if it determines that the alien "would not pose a danger to property or persons, and . . . is likely to appear for removal proceedings." *See id.* § 236 1(c)(8). If ICE denies release on bond (or sets a bond the alien believes is excessive), the alien may seek review of the custody decision in immigration court through an individualized bond hearing at which he may call witnesses and present evidence. *See id.* §§ 236.1(d)(1), 1236 1(d)(1) The presiding IJ is required to evaluate—based on the evidence presented at the hearing—various factors to determine whether the alien poses a flight risk or a danger to the community, and whether the alien warrants release as a matter of discretion. *See id.* § 1003.19(d); *Matter of Guerra*, 24 I. & N. Dec. 37, 40-41 (BIA 2006). It is the alien's burden to

[2] Another provision not relevant here, 8 U.S.C. § 1225(b), mandates the detention of aliens seeking admission into the U.S. who are "not clearly and beyond a doubt" entitled to be admitted. *Id.* § 1252(b)(2)(A).

demonstrate that he is neither a danger nor a flight risk "to the satisfaction of the [IJ]," *In re Guerra*, 24 I. & N. Dec. 37, at 38 (BIA 2006), *see Miranda*, 34 F.4th at 362 (finding the factors an IJ considers in determining bond satisfies due process), which is to a preponderance of the evidence standard, *see Matter of Barreiros*, 10 I. & N Dec. 536, 537 (BIA 1964). The IJ must provide the rationale for the ultimate release determination either orally (on the record) or in writing. *See* 8 C.F.R. § 1003.19(f). If the IJ concludes that the alien should not be released, the alien may immediately appeal that decision to the BIA *See id* §§ 236.1(d)(3), 1003.38, 1236.1(d)(3). Further, if the IJ denies release on bond but the alien's circumstances materially change, the alien may request another bond hearing based on those materially changed circumstances. *See id* § 1003.19(e).

B. Petitioner's Immigration History

1 Admission to U.S.

Petitioner is a 41-year-old native of Georgia and citizen of Russia. Petitioner's NTA, Federal Respondents' Exhibit 1 ("FREX 1"), at 1; Declaration of James A. Mullan, Federal Respondents' Exhibit 2 ("FREX 2") ¶ 5; *see* Pet. ¶ 22 On or about November 26, 2014, Petitioner was issued a B-2 nonimmigrant visa for business and pleasure with authorization to remain in the U.S. for a temporary period not to exceed November 25, 2017. FREX 1, at 1; FREX 2 ¶ 6. Petitioner was admitted to the U.S. three times *See* FREX 2 ¶¶ 7-9. Petitioner's last admission to the U.S. was on or about May 8, 2015 Pet ¶ 22, FREX 1, at 1; FREX 2 ¶ 9.

2. Petitioner's Asylum Application

On or about July 25, 2015, Petitioner filed the Form I-589, Application for Asylum and for Withholding of Removal, with USCIS. Pet. ¶ 22, I-589 Receipt Notice, Petitioner's Exhibit 1, Dkt. 1-2 ("PEX 1"), at 2. Petitioner included his spouse and children as dependents on his application.

Id. In August 2015, Petitioner and his dependents attended their required biometrics appointments with USCIS Pet. ¶ 23. On or about May 28, 2025, Petitioner attended an asylum interview with USCIS. Pet. ¶ 26; FREX 2 ¶ 12.

On May 31, 2025, ICE issued Petitioner a NTA with EOIR, FREX 2 ¶ 13; *see* FREX 1 (NTA), divesting USCIS's jurisdiction over Petitioner's asylum application. *See* 8 C.F.R. § 208.2(a), (b). On or about June 5, 2025, the Arlington Asylum Office issued Petitioner and his dependents a Notice of Forwarding I-589 to EOIR because USCIS no longer had jurisdiction over Petitioner's asylum application. FREX ¶ 16; *see* Notice of Forwarding I-589 to EOIR and NTAs, Federal Respondents' Exhibit 3 ("FREX 3")[3] USCIS subsequently issued Petitioner's his dependents NTAs. *See id* at 4-11

3 Petitioner's Arrest and Removal Proceedings

On May 31, 2025, ICE arrested Petitioner and issued him a NTA charging Petitioner with removability section 237(a)(1)(B) of the INA, 8 U.S.C. § 1227(a)(1)(B), as an alien who, after admission under section 101(a)(15) of the INA, 8 U S C § 1101(a)(15), remained in the U.S. for a time longer than permitted , in violation of the INA. FREX 2 ¶ 13; *see* FREX 1. That same day, ICE determined, pursuant to 8 C.F.R. § 236 1(c)(8), made an initial custody determination and decided to retain custody of the Petitioner FREX 2 ¶ 15. One June 5, 2025, Petitioner's attorney entered her appearance before the immigration court *Id.* ¶ 17. Petitioner is also scheduled for an initial hearing before an IJ on June 16, 2025 FREX 1; FREX 2 ¶ 19. As of the date of this filing,

[3] While not relevant in this action, because USCIS forwarded Petitioner's asylum application to EOIR, Petitioner's dependents were served NTAs by USCIS. FREX 3, at 4-11, *see* USCIS Affirmative Asylum Procedures Manual § III E(8) ("If a principal applicant is under the jurisdiction of the Immigration Court . . the Asylum Office will not adjudicate the Form 1-589. This outcome also affects the derivative asylum application of any dependent, even if the dependent is not under the jurisdiction of the Immigration Court."). Petitioner's family is not being detained by ICE. FREX 2 ¶ 20,

Petitioner remains detained pursuant to 8 U S C § 1226(a) FREX 2 ¶ 18. At any time, Petitioner may raise claims regarding bond and his asylum application to the immigration judge. *Id.*

C. The Instant Petition

On June 1, 2025, Petitioner filed the instant Verified Petition. *See* Dkt. 1. On June 3, 2025, this Court issued an Order to Show Cause enjoining Respondents from removing Petitioner or transferring him out of the Eastern District of Virginia. *See* Dkt. 3. This Court further ordered the Respondents to file their Response to the Petition on or before June 6, 2025, at 3:00 p.m. *See* Dkt. 3. This Court also ordered that a hearing on the Petition be held on Tuesday, June 10, 2025, at 10:00 a.m., and ordered Respondents to transport Petitioner, with his belongings, to the Court to attend his hearing. *Id* On June 6 2025, Federal Respondents filed a Consent Motion to Continue the Hearing Date, seeking to reschedule the hearing on this action. See Dkt. 5.

ARGUMENT

Despite pointing no statutory authority, no regulatory authority, and no caselaw, Petitioner claims his arrest and subsequent detention violates the Fifth Amendment. *See generally*, Pet. Petitioner claims the *decision* to detain him while his asylum application is pending is unlawful and violates his "protected liberty interest in be able to obtain the protection the law provides." *Id.* ¶ 32. Petitioner further contends the government "unilaterally and without due process strip[ped] him of those [due process] protections. Even if Petitioner's inaccurate claims were true, and if this Court had jurisdiction over Petitioner's claims, "Supreme Court precedent establishes that the current procedures used for detentions under § 1226(a) satisfy due process." *Miranda*, 34 F.4th at 366.

I. This Court lacks jurisdiction over Petitioner's claim that his arrest violates the Fifth Amendment because the INA expressly precludes judicial review over the initiation of removal proceedings.

This Court lacks jurisdiction over Petitioner's claims as Petitioner only challenges the decision to arrest and detain him after ICE alleged that he was removable under section 237(a)(1)(B) of the INA, 8 U S C § 1227(a)(1)(B). The INA specifically precludes judicial review over the decision to arrest and detain Petitioner as a result of his removable proceedings. *See* 8 U.S.C. §§ 1252(g), 1252(b)(9), 1226(e)

A. Section 1252(b)(9) precludes judicial review of the Petition.

Petitioner's habeas claims challenge the basis for his arrest (e.g. his removability) and the decision to detain him based on such removability *See generally*, Pet. He asks this Court to declare these acts unlawful and immediately release him from custody. *Id* , Prayer for Relief. But "[f]or an alien challenging his removal," the appropriate jurisdictional "path begins with a petition for review of his removal order, not a habeas petition." *Tazu v Att'y Gen* , 975 F.3d 292, 294 (3d Cir. 2020); *Johnson v Whitehead*, 647 F.3d 120, 124 (4th Cir. 2011) ("Congress has specifically prohibited the use of habeas corpus petitions as a way of obtaining review of questions arising in removal proceedings.") *cert denied*, 565 U S. 1111 (2012).

Congress has prescribed a single path for judicial review of orders of removal: "a petition for review filed with an appropriate court of appeals." 8 U.S.C. § 1252(a)(5); *Johnson*, 647 F.3d at 124. The INA further provides that, "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, *arising from any action taken or proceeding brought to remove an alien* from the U.S. under this subchapter *shall be available only* in judicial review of a final order under this section." 8 U.S.C. § 1252(b)(9) (emphasis added). "This section, known as the 'zipper' clause, consolidates review of matters

arising from removal proceedings 'only in judicial review of a final order under this section,' and strips courts of habeas jurisdiction over such matters." *Afanwi v Mukasey*, 526 F.3d 788, 796 (4th Cir. 2008), *vacated on other grounds*, 558 U.S. 801 (2009). Read in conjunction with section 1252(b)(9), section 1252(a)(5) expresses Congress's intent to channel and consolidate judicial review of every aspect of removal proceedings into the petition-for-review process in the courts of appeals. H.R. Conf. Rep. No. 109-72, at 174–75.

In fact, "most claims that even relate to removal" are improper if brought before the district court. *E O H C v Sec U.S Dep't of Homeland Sec* , 950 F.3d 177, 184 (3d Cir. 2020); *see also Reno v Am.-Arab Anti-Discrimination Comm ("AADC")*, 525 U.S. 471, 483 (1999) (labeling section 1252(b)(9) an "unmistakable zipper clause," and defining a zipper clause as "[a] clause that says 'no judicial review in deportation cases unless this section provides judicial review.'"); *J E F M v. Lynch*, 837 F.3d 1026, 1031 (9th Cir 2016) ("Taken together, § 1252(a)(5) and § 1252(b)(9) mean that any issue – whether legal or factual – arising from any removal-related activity can be reviewed only through the [petition for-review] process."); *Afanwi*, 526 F.3d at 796. Petitioner's claims cannot withstand this jurisdiction-stripping provision of the INA.

Because of this precedent, the Court should conclude that Petitioner must bring his Fifth Amendment claim as a challenge to his removability charge in removal proceedings, not in federal district court. *See Johnson*, 647 F 3d at 125; *Massieu v. Reno*, 91 F.3d 416, 423 (3d Cir. 1996) (reaffirming that district court review is not appropriate and review of removal is not meaningfully precluded when "the challenge by the aliens is neither procedural nor collateral to the merits").

B. Petitioner's challenges to the decision to arrest and detain him is barred from district court review pursuant to 8 U.S.C. § 1252(g).

Section 1252(g), as amended by the REAL ID Act, specifically deprives courts of jurisdiction, including habeas corpus jurisdiction, to review "any cause or claim by or on behalf of

any alien arising from the decision or action by the Attorney General to [1] commence proceedings, [2] adjudicate cases, or [3] execute removal orders against any alien under this chapter." 8 U.S.C. § 1252(g). Section 1252(g) eliminates jurisdiction "[e]xcept as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory)." *Id.* Though this section "does not sweep broadly," *Tazu*, 975 F 3d at 296, its "narrow sweep is firm," *E F L v Prim*, 986 F.3d 959, 964–65 (7th Cir. 2021). Except as provided by § 1252, courts "cannot entertain challenges to the enumerated executive branch decisions or actions." *Id.*

The statute was "'directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion,'" to protect "'no deferred action' decisions and similar discretionary decisions." *Tazu*, 975 F.3d at 297 (quoting *AADC*, 525 U.S. at 485). This particular limitation exists for "good reason": "[a]t each stage the Executive has discretion to abandon the endeavor." *AADC*, 525 U.S. at 483–84 In addition, through § 1252(g) and other provisions of the INA, Congress "aimed to prevent removal proceedings from becoming 'fragment[ed], and hence prolong[ed].'" *Tazu*, 975 F 3d at 296 (alterations in original) (quoting *AADC*, 525 U.S at 487); *see Rauda v Jennings*, 55 F 4th 773, 777–78 (9th Cir. 2022) ("Limiting federal jurisdiction in this way is understandable because Congress wanted to streamline immigration proceedings by limiting judicial review to final orders, litigated in the context of petitions for review."). Section 1252(g) prohibits district courts from hearing challenges to decisions and actions about whether and when to commence removal proceedings *See Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 599 (9th Cir. 2002) ("We construe § 1252(g)... to include not only a decision in an individual case whether to commence, but also when to commence, a proceeding.").

Circuit courts, including the Fourth Circuit, have held § 1252(g) applies to the discretionary decision to execute a removal order. *Loera Arellano v. Barr*, 785 F. App'x 195 (4th Cir. 2019);

see also Tazu, 975 F 3d at 297–99 ("The plain text of § 1252(g) covers decisions about whether and when to execute a removal order."), *Rauda*, 55 F 4th at 777–78 ("No matter how [petitioner] frames it, his challenge is to the Attorney General's exercise of his discretion to execute [his] removal order, which we have no jurisdiction to review."); *E.F.L.*, 986 F.3d at 964–65 (holding that § 1252(g) barred review of the decision to execute a removal order while an individual sought administrative relief); *Camerena v Director, ICE*, 988 F.3d 1268, 1272, 1274 (11th Cir. 2021) (holding that § 1252(g) bars review of challenges to the discretionary decision execute a removal order); *Arce v. U S* , 899 F.3d 796, 800 (9th Cir 2018) (finding that § 1252(g) would bar claims asking the Attorney General to delay the execution of a removal order); *Hamama v. Homan*, 912 F.3d 869, 874 (6th Cir. 2018) ("Under a plain reading of the text of the statute, the Attorney General's enforcement of long-standing removal orders falls squarely under the Attorney General's decision to execute removal orders and is not subject to judicial review."). Under the plain text of § 1252(g), the provision must apply equally to decisions and actions to commence proceedings that ultimately may end in the execution of a final removal order. *See Jimenez-Angeles*, 291 F 3d at 599; *see also Sissoko v Rocha*, 509 F 3d 947, 950–51 (9th Cir. 2007) (holding that § 1252(g) barred review of a Fourth Amendment false-arrest claim that "directly challenge[d] [the] decision to commence expedited removal proceedings"); *Humphries v. Various Fed USINS Emps* , 164 F.3d 936, 945 (5th Cir. 1999) (determining that § 1252(g) prohibited review of an alien's First Amendment retaliation claim based on the Attorney General's decision to put him into exclusion proceedings).

Significantly, the Fourth Circuit has readily concluded § 1252(g) bars review of the exercise of discretion to initiate removal proceedings. *See, e.g., Diaz-Portillo v Garland*, 2023 U.S. App. LEXIS 29130, *3 (4th Cir. Nov. 2, 2023), *Pineda-Perez v. Garland*, No. 22-1212, 2023

U.S. App. LEXIS 23769, *4 (4th Cir Sep 7, 2023); *Don v Garland*, 855 F. App'x 158, 159 (4th Cir. 2021); *Mehr v. Gonzales*, 246 F. App'x 211, 212 (4th Cir. 2007); *Malik v. Gonzales*, 213 F. App'x 173, 174 (4th Cir. 2007), *Solomon v. Gonzales*, 182 F. App'x 170 (4th Cir. 2006); *Villanueva-Herrera v. Ashcroft*, 33 F. App'x 145 (4th Cir. 2002). Another jurist in this district also recently held that § 1252(g) barred review over a habeas petition where "Petitioner challenges the government's decision to commence removal proceedings at all, as each habeas count argues that the commencement of removal proceedings is itself a violation of Petitioner's rights" and thus "[b]ecause each of Petitioner's claims arises from the government's decision to commence removal proceedings..., this Court also lacks jurisdiction to review Petitioner's habeas claims pursuant to Section 1252(g) " *Trabelsi*, 2024 U.S. Dist. LEXIS 241753 at *17-18.

In addition to barring challenges to *whether and when* to commence proceedings, § 1252(g) bars district courts from hearing challenges to the *method* by which the Secretary chooses to commence removal proceedings. *See Alvarez v U.S. ICE*, 818 F.3d 1194, 1203 (11th Cir. 2016) ("By its plain terms, [§ 1252(g)] bars us from questioning ICE's discretionary decisions to commence removal—and thus necessarily prevents us from considering whether the agency should have used a different statutory procedure to initiate the removal process."); *Carrero v Farrelly*, 270 F. Supp 3d 851, 877 (D. Md 2017) ("Plaintiff seeks to hold the government liable for the decision to arrest her based on a final order of removability—this claim falls squarely within the jurisdictional bar of § 1252(g)."). Arresting Petitioner to commence removal proceedings is an "action . . . to commence proceedings" that this Court lacks jurisdiction to review. *See Tazu*, 975 F.3d at 298–99 ("Tazu also challenges the Government's re-detaining him for prompt removal . . . [his] claim . . does attack the action taken to execute [the removal] order. So under § 1252(g) and (b)(9), the District Court lacked jurisdiction to review it."); *Carrero*, 270

F. Supp 3d at 877 And choosing to commence proceedings is a decision or action not subject to review. *See Tercero v Holder*, 510 F App'x 761, 766 (10th Cir. 2013) ("[T]he Attorney General's discretionary decision to detain Mr Tercero and others in New Mexico is not reviewable by way of a habeas petition ")

The fact Petitioner raises Fifth Amendment claims do not restore the jurisdiction of this Court. *See Tazu*, 975 F 3d at 296–98 (holding that any constitutional claims must be brought in a petition for review, not a separate district court action); *Elgharib v. Napolitano*, 600 F.3d 597, 602–04 (6th Cir. 2010) (noting that "a natural reading of 'any other provision of law (statutory or nonstatutory)' includes the U S Constitution" and finding additional support for the court's interpretation from the remainder of the statute). Indeed, the Supreme Court held that a prior version of section 1252(g) barred claims similar to those brought here. *See AADC*, 525 U.S. at 487–92. In *AADC*, aliens alleged that the "INS was selectively enforcing immigration laws against them in violation of their First and Fifth Amendment rights." *Id* at 473–74. The Supreme Court held that the "challenge to the Attorney General's decision to 'commence proceedings' against them falls squarely within § 1252(g) " *Id* at 487. Further, the Court found that "[a]s a general matter—and assuredly in the context of claims such as those put forward in the present case—an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation " *Id* at 488

Therefore this Court lacks jurisdiction over the Petition, and the Court should subsequently dismiss the Petition [4]

[4] Even if Petitioner's challenges to the Government's decision to initiate removal proceedings could be brought in a habeas petition—and they cannot—the INA restricts this Court's review of detention decisions Importantly, Petitioner does not challenge the length of his detention. He challenges ICE's decision to detain him at all, and that claim is not available. *See Toure v Hott*, 458 F. Supp. 3d 387, 401 n 4 (E.D. Va 2020) (recognizing that "The Government has identified a

II. If this Court were to find it has jurisdiction to review the Petition, Petitioner's Arrest and Detention Do Not Violate the Due Process Clause

Petitioner's next claim is that his "unlawful arrest and detention" violates the Fifth Amendment Due Process Clause. And the only relief Petitioner seeks is "immediate release." Pet., Prayer for Relief. But Fourth Circuit precedent forecloses Petitioner's claim.

Despite Petitioner claiming "the procedures employed by [the Government] offered Petitioner no hearing, no notice, and no opportunity to be heard," Pet. ¶ 37, "Supreme Court precedent establishes that the current procedures used for detentions under § 1226(a) satisfy due process." *Miranda v Garland*, 34 F.4th 338, 366 (4th Cir. 2022). In *Miranda*, the Fourth Circuit reviewed the district court's entry of a preliminary injunction ordering "on a class-wide basis, that to continue detaining an alien under § 1226(a), the government must prove by clear and convincing evidence that an alien is either a flight risk or a danger to the community." *Id.* In light of the Fourth Circuit's holding in *Miranda,* it is clear that the "detention procedures adopted for § 1226(a) bond hearings provide sufficient process to satisfy constitutional requirements." *Miranda*, 34 F.4th at 346.[5] As the exhibits to this memorandum show, Petitioner is receiving the procedures that *Miranda* upheld. Therefore, the Court should decline to issue a Writ of Habeas Corpus.

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statutory limitation precluding release as a form of relief. Plaintiffs Don, Andaso, and Aguilon are each detained by 8 U S C § 1226(a), and therefore subject to § 1226(e)"). The decision to detain Petitioner is governed by 8 U.S C § 1226(a), which is the discretionary detention statute that authorizes detention pending a final decision in removal proceedings. *See* 8 U.S.C § 1226(a) (authorizing ICE to arrest and detain an alien "pending a decision on whether the alien is to be removed from the [U.S]") The INA explicitly bars judicial review of the discretionary decision over whether or not to detain someone placed in removal proceedings. Section 1226(e) provides that: "The Attorney General's discretionary judgment regarding the application of [§ 1226] shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole." 8 U.S.C § 1226(e); *Toure*, 458 F. Supp. 3d at 401 n.4.

[5] A number of different issues were presented to the Fourth Circuit in *Miranda*, and the resulting opinion split the panel on these different issues. But briefly, for the avoidance of doubt, there can be no question that on the particular issue raised here (*i e* , the due process implications of

A. *Miranda* Confirms that the *Mathews* Analysis Yields the Conclusion that Petitioner's Detention is Constitutional

Invoking the familiar due process balancing framework under *Mathews v. Eldridge*, 424 U.S. 319 (1976), Petitioner asserts that the balancing framework favors him and therefore requires habeas relief. Pet. ¶ 35 But the very arguments Petitioner raises here are just what the Fourth Circuit rejected in *Miranda*. And there, the Court reversed the district court and vacated the issued injunction after the Fourth Circuit applied the *Mathews* Due Process analysis. Thus, no habeas relief is merited here—even when applying the *Mathews* anew.

1 The procedures available to section 1226(a) detainees are constitutionally adequate given the liberty interest involved with finite detention in removal proceedings.

Per *Miranda*, the liberty interest for aliens detained under § 1226(a) must account for the unique context of immigrations and the nature of the detention under § 1226(a). Petitioner's framing to the contrary should not be countenanced, for it is inconsistent with binding precedent. To start, *Miranda* rejected the contention that detention under § 1226(a) risks the same "indefinite and potentially permanent" detention at issue in *Zadvydas v Davis*, 533 U.S. 678, 696 (2001). *Miranda*, 34 F.4th at 360, *see* Pet. ¶ 36. That conclusion, *Miranda* reasoned, impermissibly

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discretionary detention under § 1226(a)), Part III of Judge Quattlebaum's Lead Opinion commanded a majority of the panel, and thus serves as a holding of the Fourth Circuit. Although Judge Richardson would have found that no jurisdiction exists to mount constitutional challenges to immigration detention as a result of the jurisdictional stripping provisions of the Immigration and Nationality Act (e g , 8 U S C § 1226(e)), he nevertheless recognized that the majority of the panel members held to the contrary. *Miranda*, 34 F.4th at 369 (Richardson, J., concurring in part, dissenting in part, and concurring in the judgment) To that end, and consistent with examples from the Supreme Court and the D.C. Circuit, Judge Richardson joined "Judge Quattlebaum in the issuance of a judgment that's closest to the one I would issue" and "concur[red] in the rest of his opinion"—i.e., the holding and reasoning of Part III. *Id* at 370; *see also id.* at 368 (noting that Judge Richardson "largely agree[s] with Judge Quattlebaum's analysis"), *id.* at 370 (finding error with the district court as "it also failed to recognize the crucial distinction between the constitutional rights afforded to citizens and rights afforded to those illegally in our country").

expands *Zadvydas* "beyond the context of the indefinite and potentially permanent detention involved there." *Miranda*, 34 F.4th at 361. Instead, as the statutory language and binding precedent make clear, "detention under § 1226(a) is pending an alien's removal hearing," *id* , meaning that it "is for a specified period of time—the time it takes to conduct a removal hearing," *id. See also id.* ("After *Jennings* and *Demore*, *Zadvydas* has little bearing on the detention procedures at issue here."). Thus, contrary to Petitioner's claim, *Mathews*' reference to the individual liberty interest at stake encompasses the understanding that detention under § 1226(a) is *limited* and has a *specific end point. Cf. Hamama v Adducci*, 946 F.3d 875, 878 (6th Cir. 2020) (holding that definitive "endpoints" of removal proceedings "allay[] any constitutional concerns" with detention during removal proceedings under § 1226(c), which provide *no* bond hearings to detainees).

With this understanding, *Miranda* concluded that district court's "fail[ure] to recognize and incorporate into its analysis Supreme Court precedent establish that aliens are due less process when facing removal hearings than an ordinary citizen would have," "constitute[d] an error of law." *Miranda*, 34 F.4th at 361 Petitioner invites the Court to make this same error of law by broadly characterizing the liberty interest as one "in being able to obtain the protection the law provides him." Pet. ¶ 32. Interestingly enough, Petitioner fails to adequately state *what* the protection is. From reading his Petition, it seems that he is claiming that he has a liberty interest in having his asylum application adjudicated prior to removal. *See* Pet. ¶¶ 32-34. But that in no way infects the constitutionality of Petitioner's detention. And because this claim does not implicate his detention, Petitioner cannot make such claim through a habeas petition as the INA precludes him from doing so. *See supra* Part I. In addition, there is no dispute that Plaintiff will have the opportunity to raise his asylum claims in the immigration court hearing that is scheduled for next week. *See* FREX 2 ¶ 19 To this end, USCIS has forwarded Petitioner's asylum application to

EOIR. *See* FREX 3 There is no evidence suggesting, neither in his habeas petition nor in the Government's filings, that Petitioner will be removed before his asylum application is adjudicated.

As the *Miranda* Court reasoned, the Due Process formulation – in particular, the assessment of the weight to be provided to any liberty interest at stake – needs to account for "the immigration context," as the "Supreme Court has stated over and over that '[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.'" 34 F.4th at 359 (quoting *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976)); *see also Reno v Flores*, 507 U.S. 292, 305 (1993) (similar); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (similar)) And to further support that conclusion, *Miranda* noted that the Supreme Court previously rejected a § 1226(c) detainee's claim (who, unlike Petitioner, has no access to a bond hearing) that it was unconstitutional to place the evidentiary burden on the alien to obtain release under § 1226(c)'s narrow exception to mandatory detention. 34 F.4th at 360 (citing *Demore v Kim*, 538 U.S. 510, 521, 528 (2003)). Pointing to the Supreme Court's conclusion that "when the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal," *Miranda* found that it is not within the Court's province "to impose its own policy judgment on how best to ensure aliens' attendance at future removal proceedings." *Id* (quoting and citing *Demore*, 538 U.S. at 528); *see also Demore*, 538 U.S. 523 (noting that "detention during deportation proceedings [remains] a constitutionally valid aspect of the deportation process"); *Flores*, 507 U.S at 305-06 (noting that "over *no conceivable subject* is the legislative power of Congress *more complete*" (emphasis added)).

Thus, consistent with *Miranda*, which ultimately held that present § 1226(a) procedures satisfy due process, the due process analysis must account for the liberty interest of aliens (as opposed to citizens) with the further understanding that detention under § 1226(a) is finite and that

in the immigration context, Congress's designated procedural avenues for release do not have to be the least burdensome *See also Wilson v Zeithern*, 265 F. Supp. 2d 628, 635 (E.D. Va. 2003) (detention of inadmissible alien pending removal did not violate due process as "an illegal alien present within the country," Petitioner may claim only a "limited liberty interest"). And under this framing, there is no doubt that Petitioner's present detention does not violate the Constitution.

2 Well-established bond regulations for § 1226(a) detainees supply constitutionally adequate safeguards

As stated, Petitioner claims that such procedures employed by the Government "offer[] Petitioner no hearing, no notice, and no opportunity to be heard." Pet. ¶ 37. But this is neither factually correct nor correct under the law. *Miranda* held that Petitioner's complaints "fail to show how the current procedures result in erroneous deprivations or how the procedures [Petitioner] proposed will reduce erroneous detention decisions," as required to demonstrate a due process violation. *Miranda*, 34 F.4th at 361. And Plaintiff will have the opportunity to seek bond and raise his asylum request before an immigration judge in just a few days.

"Due process is not a one size fits all proposition." *Miranda*, 34 F 4th at 359; *see also Landon v Plasencia*, 459 U.S 21, 34 (1982) ("The constitutional sufficiency of procedures provided in any situation . . . varies with the circumstances."). *Miranda* clearly states that there are three opportunities for seeking release from detention, even when the Government bears the evidentiary burden, which supplies adequate due process. To start, *Miranda* rejected the notion that "detention proceedings are tipped steeply in favor of the government" *Id* at 362. As the Fourth Circuit explained, "aliens should know as much or more than the government about their own criminal history, and they should know more than the government about any mitigating evidence related to that history. They should also know more than government about family or

employment information, which could bear on their risk of flight and any danger they pose to the community" *Id*

Next, the Fourth Circuit concluded that § 1226(a) detainees, "already receive the fundamental features of due process—notice and an opportunity to be heard." *Id.* (citing *Mathews*, 424 U.S. at 333); *see also Borbot v Warden*, 906 F.3d 274, 278-79 (3d Cir. 2018) (recognizing that alien was "granted meaningful process" because he "was afforded a prompt bond hearing, as required by § 1226(a) and its implementing regulations"). In this respect, "the current procedures provide aliens detained by the government three separate opportunities to make their case concerning bond," *Miranda*, 34 F.4th at 362: (1) the immigration officer's determination near in time to the initial detention; (2) a bond hearing before an IJ, and (3) and an appeal of the immigration judge's order to the BIA. *Id* And both the IJ and the BIA have a wide range of factors to consider, which "provide substantial process" to § 1226(a) detainees. *Id* Also, the Supreme Court has held that substantially similar procedures, where the alien bears the evidentiary burden no less, satisfy the requirements of the Due Process Clause. *E g., Flores*, 507 U.S. at 308 (rejecting due process challenge where regulation provided for initial custody determination by officer, optional redetermination by IJ, and ultimate review by BIA); *Dep't of Homeland Sec v Thuraissigiam*, 140 S Ct 1959, 1965-66 (2020) (holding that statute providing inadmissible alien with "an opportunity at three levels to obtain an asylum hearing" for arriving aliens neither violated the Due Process Clause nor violated the Suspension Clause when it stripped habeas jurisdiction); *Zadvydas*, 533 U.S. at 701 (holding that for detentions under § 1231 after six months and to avoid offending the constitution, the alien can seek release once *the alien* provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future").[6]

[6] Even the Supreme Court dissent in *Jennings*, which would have applied the canon of

Petitioner has access to all three opportunities to challenge his custody. Significantly, Petitioner has not acknowledged the issue of bond, even though he has a hearing date set for June 16, 2025. FREX 2 ¶ 19. Petitioner is free to seek bond, as well as asylum, at any time throughout his removal proceedings. *See id* Petitioner cannot simply ignore the administrative process of immigration and claim a due process violation in this court just because *he* believes his detention is unlawful [7] And regardless of the length of detention, the Fourth Circuit has shown that the sheer length of detention does not alter the constitutional analysis, though Plaintiff's *six*-day detention certainly falls far short of any constitutional concern. Per *Miranda*, the procedures made available to those detained § 1226(a) provide adequate due process.

3 The Current Procedures for § 1226(a) sufficiently protect the Government's Interest.

Consistent with the Fourth Circuit's holding in *Miranda*, the due process analysis must consider the Government's significant interest in its control of immigration proceedings. As a general matter, the Supreme Court has stressed that the government "need[s] . . . flexibility in policy choices rather than the rigidity often characteristic of constitutional adjudication" when it comes to immigration regulation *Mathews v Diaz*, 426 U.S. 67, 81 (1976). Accepting Petitioner's

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constitutional avoidance to interpret the INA's detention provisions as authorizing bond hearings, concluded that any such hearings "should take place in accordance with customary rules of procedure and burdens of proof rather than the special rules" Petitioner seeks here. 138 S. Ct. at 876 (Breyer, J , dissenting).

[7] That Petitioner believes his circumstances merit release, but has not actually moved for a bond hearing inherently begs the question of whether the Writ of Habeas Corpus is the appropriate remedy in these circumstances For if Petitioner sought and obtained bond, and the IJ's determination permitted his release, there is no need for these proceedings. Binding precedent makes clear that there is always an open question whether the power to issue the Writ "ought to be exercised." *Timms v Johns*, 627 F 3d 525, 530 (4th Cir. 2010) (noting the discretionary language in the habeas statute and reaffirming the principle that "courts require exhausted of alternative remedies before a prisoner can seek federal habeas relief" (cleaned up)).

position would flout this directive by injecting that very rigidity into the discretionary detention regime adopted by Congress.

In determining what process is due in immigration proceedings, "it must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature." *Landon v. Plasencia,* 459 U.S. 21, 34. "[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government." *Diaz*, 426 U.S. at 81 n.17 (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952)). "Congress has repeatedly shown that it considered immigration enforcement—even against otherwise non-criminal aliens—to be a vital public interest, so vital that it is has tried to cabin judicial review of immigration enforcement" *Id* (collecting statutory provisions). "Importantly, during the deportation process, that government interest includes detention." *Miranda*, 34 F.4th at 364; *see also Nken v. Holder*, 556 U.S. 418, 436 (2009) ("There is always a public interest in prompt execution of removal orders: The continued presence of an alien lawfully deemed removable undermines the streamlined removal proceedings IIRIRA established, and permit[s] and prolong[s] a continuing violation of [U.S] law ") And the Supreme Court has stated removal proceedings "would be vain if those accused could not be held in custody pending the inquiry into their true character " *Wong Wing v. U.S.*, 163 U.S. 228, 235 (1896). The Federal Government's interests in maintaining the existing procedures for bond hearings under § 1226(a) are thus legitimate and significant. *Accord Miranda*, 34 F.4th at 366.

As to Petitioner's argument that the third *Mathews* factor favors him because Government's authority is bound by the Fifth Amendment and his detention is "unlawful under the Fifth Amendment," Pet. ¶ 33, that is a circular argument. The very purpose of these proceedings

is to assess whether a violation of the Fifth Amendment Due Process Clause exists. Of course, in the wake of *Miranda*, there is no constitutional violation. 34 F.4th at 346, 366. And as to Petitioner's related claim that his detention does not comport with the immigration law's "ordinary operation," he has put forth no evidence to suggest that. Nor could he. Petitioner has failed to raise any claims with the immigration court, which he can do at any time. Given the Petitioner will have two additionally opportunities for a bond hearing, his present detention is consistent with the purpose of § 1226(a) and will last for the limited duration of his removal proceedings, which only lasts "for a specified period of time." *Miranda*, 34 F 4th at 361.

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In sum, the totality of the *Mathews*' framework favors Federal Respondents' position and as such, just as the Fourth Circuit decided in *Miranda*, detention under section 1226(a) do not offend the Due Process Clause. Thus, because Petitioner's detention is not constitutionally infirm, the Court should decline to issue the Writ of Habeas Corpus.

CONCLUSION

For all these reasons, Federal Respondents respectfully request that the Court decline to issue a Writ of Habeas Corpus in this action

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Respectfully submitted,

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By. /s/

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